

FILE

KRAVITZ, BROWN & DORTCH, LLC

Attorneys at Law

Janet Kravitz
Paula Brown
Michael D. Dortch
Richard R. Parsons

65 East State Street - Suite 200
Columbus, Ohio 43215-4277
614.464.2000
fax 614.464.2002

mdortch@kravitzllc.com

Max Kravitz (1946-2007)

Of Counsel:
William H. Bluth*

* Also Admitted in NY

October 1, 2008

VIA MESSENGER DELIVERY

Ms. Renee Jenkins, Chief
Docketing Division
Public Utilities Commission of Ohio
180 East Broad Street
13th Floor
Columbus, OH 43215

RECEIVED-DOCKETING DIV
2008 OCT -1 PM 2:21
PUCO

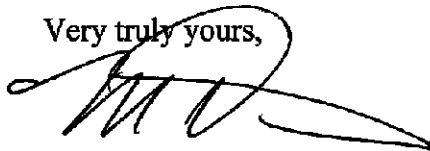
Subject: In the Matter of the Application of Duke Energy Retail Sales, LLC
For Recertification as a Retail Generation Provider and Power Marketer
Case No. 04-1323-EL-CRS

Dear Ms. Jenkins:

Enclosed please find an original and twelve copies of Duke Energy Retail Sales, LLC's Memorandum Contra the Ohio Consumers' Counsel's Motion to Strike DERS' Memorandum Contra OCC's Application suspend the application, and motion to deny the application or, in the alternative, to set the matter for hearing.


Please accept the original and eleven copies of this document for the Commission's files, and after file-stamping the remaining copy, return it to me via the individual who delivers the documents to you. You may call me if you have any questions concerning this filing. As always, your attention is appreciated.

Very truly yours,



Michael D. Dortch

cc (w/enc.): Kimberly W. Bojko, Esq. (via messenger delivery)
Terry L. Etter, Esq.
Jeffrey L. Small, Esq.
Ann M. Hotz, Esq.

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business
Technician  Date Processed 10-1-08

bcc: Kodwo Ghartey-Tagoe, Esq.
Michael Pahutski, Esq.
Rocco D'Ascenzo, Esq.

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Renewal Application of :
Duke Energy Retail Sales, LLC for : Case No. 04-1323-EL-CRS
Certification as a Retail Generation :
Provider and Power Marketer :

PUCO

RECEIVED-DOCKETING DIV
2008 OCT -1 PM 2:21

**DUKE ENERGY RETAIL SALES, LLC'S
MEMORANDUM CONTRA
THE OHIO CONSUMERS' COUNSEL'S
MOTION TO STRIKE
AND IN THE ALTERNATIVE,
MOTION, *INSTANTER*, FOR LEAVE TO FILE
ITS MEMORANDUM CONTRA OCC'S MOTIONS ONE DAY LATE**

I. INTRODUCTION

Duke Energy Retail Sales, LLC (DERS) is a certificated provider of competitive retail electric services (CRES), possessing Renewal Certificate No. 04-124 (2), issued by this Commission on October 3, 2006. On August 28, 2008, DERS filed an Application to Renew its Certification as a CRES provider.

The Office of the Ohio Consumers Counsel (OCC) moved to intervene in DERS' recertification proceeding on September 15, 2008, and at the same time filed a *Motion to Suspend Application and Motion to Deny the Application or in the alternative, Motion to set the Matter for Hearing* (OCC's Motions).

On September 18, 2008, an Attorney Examiner issued an Entry that 1) suspended DERS' application, 2) directed DERS to file any contemplated Memorandum Contra OCC's Motions within seven (7) days after the date of the Entry, and 3) further directed OCC to file any contemplated Reply to DERS' Memo Contra within four (4) days after the date DERS filed its Memo Contra.

On September 26, 2008, DERS filed its Memorandum Contra OCC's Motions. On September 30, 2008, OCC filed a Motion to Strike DERS Memorandum Contra OCC's Motions and, in the Alternative, its Reply to DERS' Memo Contra.

II. ARGUMENT

OCC's Motion to Strike points out that DERS' Memo Contra was filed eight (8) days after the date of the Attorney Examiner's Entry of September 18, 2008. OCC is correct.

Undersigned counsel learned of the Attorney Examiner's Entry expediting DERS' response on September 19, 2008, immediately accessed the Commission's Docket Information System in order to review the Entry and the Service Notice, but then inadvertently miscalculated the seven day response time – probably by beginning with the date of September 19,¹ rather than September 18. Undersigned counsel regrets this inadvertent error, of which he remained unaware until he received an emailed copy of OCC's Motion to Strike at approximately 4:30 p.m. on September 30, 2008. DERS respectfully requests that this inadvertent error be excused or, in the alternative, that leave to file one day out of time be granted, *instante*. Granting this request will not prejudice OCC in any way as it has already responded to DERS' Motion. In the absence of actual prejudice to a party, the Commission will typically accept and consider untimely filings. See In the Matter of the Commission's Review of the MTSS Standards, Case no. 00-1265-TP-ORD, *et al.* (Entry dated February 6, 2008 granting OCC's Motion for leave to file comments out of time based upon a showing of good cause); In the Matter of the Applications of Ohio Edison Co., Cleveland Electric Illuminating Co. and the Toledo Edison Co. for Retail Transition Cost Recovery, Case no. 03-1445-EL-ATA, *et al.* (Entry dated August 2, 2005,

¹ The docketed service notice accompanying the Entry indicates that it was processed on the date of September 19, 2008. Undersigned counsel is unable to state whether or not this contributed to his error.

granting Ohio Edison's Motion for Leave to file out of time on the basis of a lack of prejudice to the City of Huron, which opposed that Motion).

OCC nonetheless alleges that it was prejudiced as a result of counsel's error and as a result of the fact that counsel did not email a copy of DERS' Memo Contra to OCC's attorneys until the end of the day. DERS disagrees that OCC has been prejudiced in any way in this matter. In fact, OCC itself correctly points out that the Attorney Examiner's Entry required neither the service of documents nor the acceptance of service via electronic means, and that undersigned counsel therefore served them via U.S. Mail.² Aware of the short time frame for response, however, DERS also provided OCC with a courtesy copy of its Memo Contra on September 26, 2008, via email to Ms. Etter, Ms. Hotz, and Mr. Small, immediately after receiving a confirmation copy indicating that DERS' Memo Contra was filed. OCC therefore received the full four days in which to respond and, even if no one within OCC became aware of DERS' Memo Contra until Monday morning, it still received no less notice than required through the Attorney Examiner's Entry, and OCC nonetheless was able to prepare and file a twelve page Memorandum in Support of its Motion to Strike and Reply to OCC's Motion within the two working days that followed. Moreover, had OCC's counsel merely advised DERS of the error concerning DERS' filing date and requested additional time in which to submit a Reply, DERS would have joined OCC in seeking such additional time.

III. CONCLUSION

Undersigned counsel erred when calculating the date upon which DERS' Memorandum Contra OCC's Motions was due, resulting in that Memorandum Contra being submitted one day late. OCC received emailed copies of the Memorandum Contra the date it was filed, and thus four days before it filed its response. OCC has suffered no prejudice and DERS respectfully

² Memorandum in Support of OCC's Motion to Strike, p. 2.

requests that its Memorandum Contra OCC's Motions be accepted as timely filed and considered by the Commission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael D. Dortch", with a large, stylized flourish extending to the right.

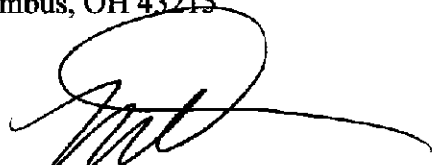
Michael D. Dortch (0043897)
KRAVITZ, BROWN & DORTCH, LLC
65 East State Street
Suite 200
Columbus, Ohio 43215
Phone: 614-464-2000
Fax: 614-464-2002
mdortch@kravitzllc.com

Attorneys for
DUKE ENERGY RETAIL SALES, LLC

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the parties by depositing the same in the United States Mail, postage prepaid, addressed as follows, on this 1st day of October 2008.

Terry L. Etter, Esq.
Jeffrey L. Small, Esq.
Ann M. Hotz, Esq.
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street
Suite 1800
Columbus, OH 43215



Michael D. Dortch